State of California

emorandum

JUL 1 6 1992

Date:

To

Statement Files 10052, 10073, 10077, 10092 10101, 10104, 10123, 10924 and 10960

Katherine Mrowka

Associate WRC Engineer

DIVISION OF WATER RIGHTS

STATE WATER RESOURCES CONTROL BOARD

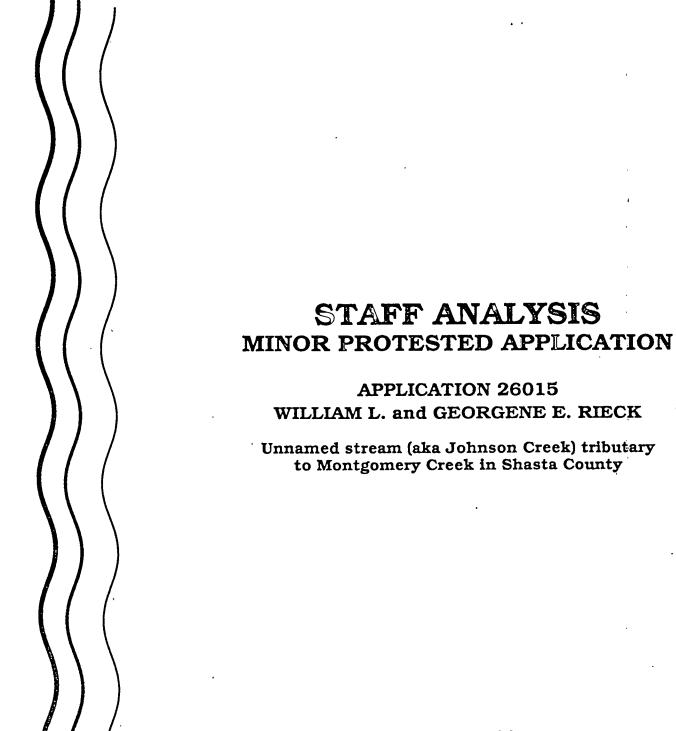
Subject:

From

INFORMATION REGARDING THE BASIS OF RIGHT FOR STATEMENTS OF WATER DIVERSION AND USE LISTED ABOVE

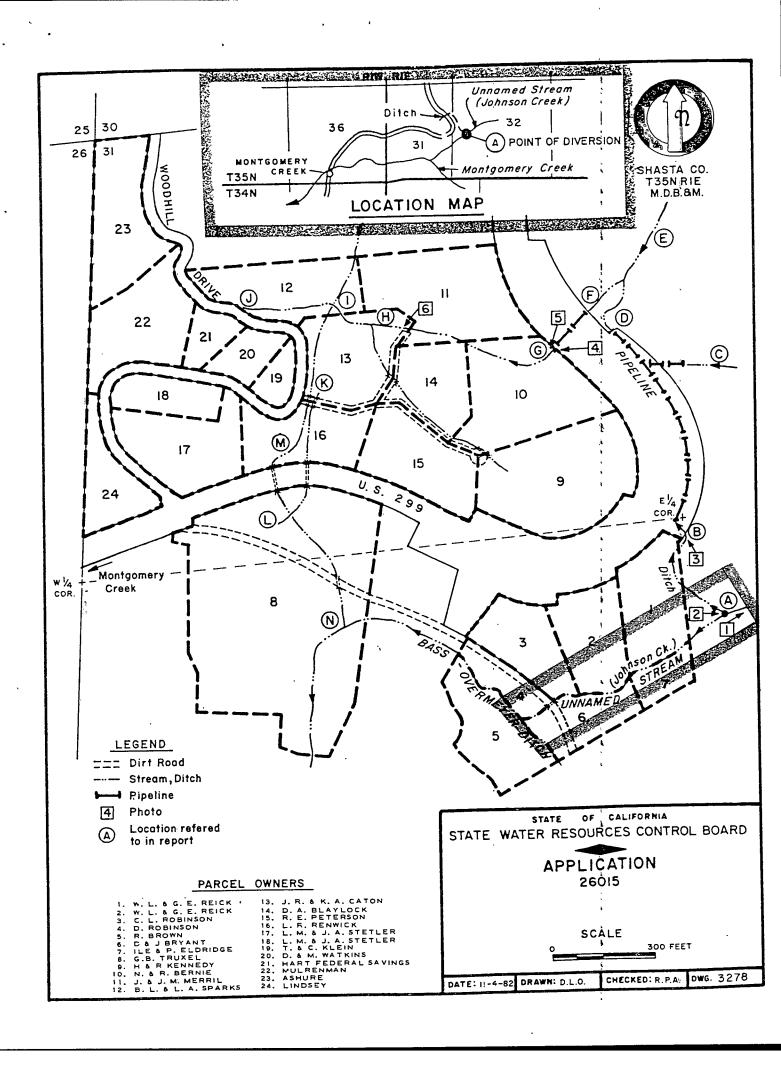
During April, 1992, the Division of Water Rights circulated a Staff Analysis of Minor Protested Application 26015. No acceptable hearing requests were filed. Therefore, the Staff Analysis is now considered final. The analysis discusses the basis of right for the Statements of Water Diversion and Use listed above. Therefore, the pertinent pages of the analysis should be included in these files.

Attachments



APRIL 1992

STATE WATER RESOURCES CONTROL BOARD CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY



in 1929 and was eventually sold to the ditch water users. The Notice specifically lists the parcels adjacent to Johnson Creek as the parcels which the claim was intended to serve. Therefore, it does not appear that Mr. Questini intended the claim to establish a basis of right for Parcels 9 through 23.

6.3 Statements of Water Diversions and Use and Listing of Parcel Ownership

Nine of the protestants have filed Statements to describe their claimed water rights. The Statements are listed below:

Statement 10052 10073 10077 10092 10101 10104 10123 10924 10960 ** ** **	Sparks Watkins Kennedy Troxell Caton Shuffleton Blaylock, et al. Klein Stetler Merrill Petersen Renwick	Parcel 12 20 9 8 13 10 14 19 17 & 18 11 15 16 22, 23 &	Amount 2,500 gpd 0.012 cfs 0.050 cfs 0.325 cfs 0.038 cfs 0.095 cfs 0.032 cfs 14,000 gpd 0.060 cfs	Year of First Use 1976 1979 (per protest) 1976 1883 1963 (per protest) 1883 1883 1979 (per protest) 1929 unknown 1883 (per protest)² 1976 (per protest)
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^{**} No Statement on file for these protestants.

6.4 History of Dispute Regarding Water Use

The Division's records indicate that a dispute arose in 1977 between the owners of Parcels No. 1 through 6 and owners of Parcels No. 8 through 21 as to whether the pre-1914 appropriative rights apparently initiated by John Questini at diversion Point A were lost due to forfeiture for a period of non-use of at least five years prior to 1977. Further information about the ditch was obtained from the "Complaint for Determination of Water Rights, Trespass, Nuisance and Injunction" filed on behalf of William and Georgene Rieck in Shasta County Superior Court on November 3, 1983. The complaint alleges that the Upper ditch was out of service for a substantial period of time in the 1960's and 1970's.

¹ 1982 Field Investigation found that the only water which has been used is for fire control. There is limited development of the parcel, and it had been recently sold. The new owner will likely make beneficial use of water in the future.

² 1982 Field Investigation found that no water had been beneficially used for a number of years. The parcel had not been developed.

 $^{^{\}rm 3}$ 1982 Field Investigation found that no water has been used on these parcels for many years.

6.5 Discussion of Pre-1914 Appropriative Right

The 1976 Agreement describes the ditch water right as a riparian right; no reference is made to any pre-1914 appropriative right. However, the Division's Johnson Creek adjudication file indicates that the ditch users have previously claimed a pre-1914 appropriative right on Johnson Creek. Also, the ditch users submitted information regarding a claimed pre-1914 appropriative right to support their protests of Application 26015. The pre-1914 claims of right are described in Section 6.2 of this Analysis.

In reviewing water use under claimed pre-1914 right, the following is noted. First, once an appropriative right has been acquired, it can be maintained only by continuous beneficial use of water. Second, regardless of the amount claimed in the original notice of appropriation or at the time diversion and use first began, the amount which now can be rightfully claimed under an appropriative right initiated prior to December 19, 1914 has, in general, become fixed by actual beneficial use as to both amount and season of diversion. (see California Water Code Section 1202(b)). Third, the place of use or purpose of use may be modified under a pre-1914 claim of right.

The Department of Water Resources (DWR) investigated existing water use in this area of Shasta County (see attached Application 26015 Location Map) and reported this use in "DWR Bulletin 22 - Shasta County Investigation, July, 1964". The report summarizes the lands upon which water was utilized during 1955 and 1956 (see page 66). The irrigated lands are shown on DWR Plate 15 map, dated 1960. Bulletin 22 indicates that less land was irrigated in 1960 than is presently irrigated. The DWR maps indicate that only Parcels 8, 15, 16, 17 and 18 were irrigated in 1960. The map indicated that Parcel 12 is within the boundaries of irrigable lands. The remaining parcels were not included within the presently irrigated or irrigable areas. Finally, the 1956 U.S.G.S. Montgomery Creek quadrangle map shows no houses on Parcels 9 through 24. The only residence which existed at that time was located on Parcel 8.

Many of the protestants have indicated that water use began on their parcels prior to 1960, though their personal domestic use was initiated at a later date. The DWR map provides useful information on the limits of the actual irrigated area in 1960. The Division's 1982 investigation found that no water use was occurring on Parcel 15. Thus, it appears that irrigation of this parcel had ceased by 1982. Irrigation of Parcels 19, 20 and 21 was apparently initiated after 1960. Based upon this information, Division staff concludes that total water use for irrigation purposes has increased beyond historic levels after 1960.

Water use for domestic purposes also appears to have increased after 1914. A summary of annual water development by the ditch users was obtained by adding together the annual use listed in the Statements (see Section 6.3) or obtained by investigation (see Section 7.0 for this data). The first column represents data obtained from the Statements, unless otherwise noted.

Quantity Date Use Bed	gan <u>Parcel Numbers</u>
0.357 cfs 1883	8, 14 (DWR Bulletin 22 indicates that Parcel 14 was not irrigated in 1960 and the 1956 U.S.G.S. map shows no house on this parcel. Therefore, it does not appear that there is a valid pre-1914 claim of right to 0.007 cfs (per 1982 field investigation). Also, an 1883 priority is claimed for Parcels 10 and 15, but the 1982 investigation found that no water was being used on these parcels.)
0.060 cfs 1929	17, 18 (0.072 cfs per investigation)
0.038 cfs 1963	13 (per Statement, 0.0093 cfs per investigation) (Domestic use on Parcels 17 and 18 is said to have begun in 1963irrigation use on these parcels began in 1929. All water used on these two parcels is listed above under year 1929.)
0.073 cfs 1976	9, 12, 16
<u>0.034 cfs</u> 1979	19, 20 (0.026 cfs per investigation)
Total 0.562 cfs	(Investigation concluded use is 0.33 cfs, whereas the use listed in the Statements is 0.56 cfs.)

Seven of the ten protestants have indicated that their use was initiated after 1963. Further, protestant Shuffleton (Parcel 10) has indicated that his use began in 1883. However, the 1982 field investigation found that water use on the Shuffleton parcel was limited to fire protection. Based upon the information summarized above, it appears that use of roughly 0.35 cfs was initiated prior to 1914. Use of about 0.21 cfs (balance of column 1) was apparently initiated after 1914.

The 0.35 cfs noted above (Statement 10092 lists 0.325 cfs) is used on Parcel 8, which also obtains water from the Bass-Overmeyer Ditch under pre-1914 claim of right. Division staff estimates that only part of the 0.325 cfs pre-1914 claimed right for Parcel 8 was obtained from Johnson Creek because Parcel 8 is better situated to obtain water from the Bass-Overmeyer Ditch. Parcel 8 may also obtain water from the unnamed stream which originates on the north side of Highway 299.

Prior to the 1975 settlement of the Estate of Alice May Lattin, the Upper ditch was mainly used to provide water for irrigation purposes. As noted above, the 1960 DWR map indicates that total irrigation use increased after 1960. Thus, Division staff concludes that the increase in domestic use has not been offset by a reduction in irrigation use and total water use has increased.

The pre-1914 claim of right filed by John Questini states that it was filed to initiate a right for Parcels 2, 3, 5, 6 and 8. Mr. Questini indicated that "I intend to divert it by flume and ditch in size adequate to carry the ...

amount appropriated." It does not appear that Mr. Questini intended to initiate a right for Parcels 9 through 23. Even if a right was established for these parcels, the right would have become fixed by actual beneficial use. It cannot be enlarged at this late date to accommodate the water users who have recently initiated use. Water use has increased since 1914 and it does not appear that the new uses can be classified as maintenance of any pre-existing appropriative right that may have existed. Thus, it appears that the claimed pre-1914 appropriative right is inadequate to cover present uses and the protests filed by the owners of Parcels 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23 and 24 cannot be maintained. The protest filed by the owner of Parcel 14 can only be maintained if domestic use has been ongoing since December 19, 1914, because Division records indicate that the property was not historically irrigated. However, the 1956 U.S.G.S. Montgomery Creek quadrangle map indicates that there was no house on Parcel 14 in 1956. Thus, the protest filed by Blaylock, et al. (Parcel 14) should be dismissed. Only the protest filed by Troxell (Parcel 8) based upon a pre-1914 claim of right should be maintained. Division staff notes that Merrill, the owner of Parcels 11 and 21 did not protest Application 26015.

6.6 Riparian Claim of Right

The recorded water supply agreement (see Section 6.1) states that the basis of right is riparian. A riparian right is limited to the amount which is naturally tributary to the property, exists by reason of ownership of land abutting upon a stream or body of water and affords no basis of right to use water upon nonriparian land. (Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 80 P. 2d 533) The shaded area on the Location Map indicates the approximate boundary of the land within the watershed of Johnson Creek, which is the extent of the lands riparian to this source. The riparian right for use of Johnson Creek water does not appear to extend to Parcels 9 through 23 because the lands are not within the watershed of the source. The property owners (of Parcels 9 through 23) may be served under riparian claim of right from the other three sources shown on the Location Map (at locations C, E, and I) if the ditch was established prior to subdivision of the ranch and the riparian right was preserved.

Parcel 8 is within the watershed of Johnson Creek. In order to divert water under claim of riparian right, the diverter must use the water on riparian land but need not own the land at the point of diversion. That is, such diverter may divert at a point upstream from his land so long as permission is granted to use that point of diversion, and intervening land owners between the point of diversion and the place of use are not adversely affected by such practices. (Turner v. James Canal Co., 155 Cal. 82, 99 P. 520 (1909)) To use the point of diversion on BLM land, the water must pass through the Rieck property in the ditch (he appears to be riparian on the portion of his land which is within the watershed of Johnson Creek). The Riecks object to the claimed riparian diversion by the ditch water users and filed a Complaint for Determination of Water Rights, Trespass, Nuisance and Injunction in the Shasta County Superior Court on November 3, 1983. Due to the expense of pursuing this matter in Court, Mr. Rieck has expressed his desire for the Division to proceed with a determination of whether Application 26015 should be permitted.

6.6.1 Conclusions Regarding Riparian Rights of Protestants

It does not appear that water from Johnson Creek which is conveyed by the Upper ditch can be used on Parcels 9 through 23 under a riparian claim of right because these parcels are located outside of the watershed of Johnson Creek. Further, it appears that Parcel 8 cannot be served under riparian claim of right because the landowner at the point of diversion, the Riecks, have denied access to the point of diversion and the Riecks claim that the present diversion is adverse to their riparian right. It appears that this element of the protest based on injury to vested rights should be dismissed because the protestants do not appear to have a valid basis of riparian right for Johnson Creek.

7.0 AVAILABILITY OF UNAPPROPRIATED WATER

As described in the protest filed by the Bureau, the proposed diversion season is inconsistent with the times when unappropriated water is available as determined by the State Water Board in Decision 1045. The applicant may be entitled to water pursuant to an area of origin principle. However, this analysis is silent on this issue because of other State Water Board decisions which affect water availability in this watershed (see discussion of Decision 1594 below). The previous applicant, Paul Rideout, agreed to the following permit term to address the water availability issue:

Buring the period between June 15 and September 1, if in the absence of permittee's diversion, hydraulic continuity would exist between permittee's diversion point and Montgomery Creek, permittee shall not divert water, but shall open his diversion works and allow the water to flow undiminished downstream."

Division staff does not recommend inclusion of the proposed permit term. Johnson Creek is a perennial stream. The proposed term would require continual flow bypass during the summer months and the Riecks would not be able to divert water under riparian claim of right in these circumstances. Alternatives to inclusion of this term exist and appear to be feasible. In Decision 1594, the State Water Board found that there is no unappropriated water available from June 15 through August 31 to approve diversions of less than one cfs from any tributary of the San Francisco Bay-San Joaquin Delta above Collinsville. Roughly one-half of the Riecks property is located within above Collinsville. Roughly one-half of the Riecks property is located within the Johnson Creek watershed (see Location Map) and may be served under riparian claim of right. However, the application does not indicate which part of the parcel will be served and the Division's records do not indicate whether only the riparian portion of the Rieck property will be served. Thus, it appears that the options for issuance of a permit authorizing year-round appropriation of water should be investigated.

One option is to authorize continual diversion (January 1 through December 31) if a water exchange contract is entered into with the Shasta County Water Agency (this is one of the alternatives suggested by the Bureau to resolve it's protest) and is consistent with State Water Board Decision 1045. If a water exchange contract is obtained to cover summer diversion, then any permit

STATE OF CALIFORNIA

Reports to

STATE WATER STREET

STATE WATER RESOURCES CONTROL BOARD DIVISION OF WATER RIGHTS

MAY 1 4 12 PM STATEMENT OF WATER DIVERSION AND USE (This is not a Water Right)

This statement should be typewritten or legibly written in ink.

S10073

	District Control of the Control of t
٨	SACHAMENTO DALLAS AND MARGIE WATKINS
	Address 4201 MATTOS DR. PREMONT Telephone 415-793-3184
В	. Name of body of water at point of diversion JOHNSON CREEK
	Tributary to MONTGOMERY CREEK
С	Place of diversion
	SHASTA County, or locate it on sketch of section grid on recovery order with with the section grid on recovery order with the section grid on recovery order with the section grid on the
	County, or locate it on sketch of section grid on reverse side with regard to section lines or prominent local landmarks. TDENTIFIED AS PARCEL TO ON PARCEL IMAP 7529-7
D.	. Name of works FLUME TO PIPE
. بـ	Capacity of diversion works ONE AND ONE HALF INCH PIPE Scubio feet per second gallons per minute gallons
	State quantity of water used each month in gallons or acro-feet
	Year Jan. Feb. Mar. Any Man. L
_	rear Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec. Annual
	If monthly and annual was are well
	If monthly and annual use are not known, check months in which water was used. State extent of use in
	units, such as acres of each crop irrigated, average number of persons served, number of stock watered, etc.
	ACRE ORCHARD. FAMILY VEGETABLE GARDEN
	Maximum annual water use in recent years UNKNOWN gallons Minimum annual water use in recent years UNKNOWN gallons
	Type of diversion facility: gravity, pump
M	
	ethod of measurement: weir, flume, electric power meter, water meter, estimate
F.	Purpose of use (what water is being used for) ID IRRIGATE FAMILY ORCHARD
•	AND GENERAL FAMILY USE
C.	Ceneral description or location of place of use (use sketch of section grid on reverse side if you desire)
	Water needed for Property Secretal on woodhill de montgomera (sec. Co.
	Year of first use as nearly as known 1883
I.	Name of person filing statement DALLAS AND MARGIE WATER
••	O LAVALET D
	Organization NOVY
	Telephone: 415-143-3184
	I doclare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.
	. California.
	Signature: Rallan Watton
	See Instructions on Reverse Side
	50ACS (17/77)